(27,708)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 358.

THE MORRISDALE COAL COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 1, 1920.

1 *I. Petition.*

Filed January 2, 1920.

In the Court of Claims.

No. 34436.

THE MORRISDALE COAL COMPANY

vs.

THE UNITED STATES.

Petition.

To the Honorable the Chief Justice and the Judges of the Court of Claims of the United States:

The claimant, the Morrisdale Coal Company, respectfully represents and alleges:

1. That your petitioner is and has been at all times herein mentioned a corporation of the State of Pennsylvania, engaged in the business of mining and shipping Morrisdale and Cunard Bituminous Coals, having its office and principal place of business at the southeast corner of Broad and Chestnut Streets, Philadelphia, Pennsylvania.

2. That by virtue of the power conferred upon him by the Act of Congress approved August 10, 1917, entitled "an act to pro-
2 vide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," the President of the United States, by Executive Order dated August 23, 1917, appointed Harry A. Garfield Fuel Administrator and delegated to him such powers and authority as had been vested in the President by the Act of August 10, in so far as applicable to fuel.

3. That prior to August 23, 1917, the petitioner herein had entered into bona fide contracts for the supply of coal to buyers, the requirements of such contracts aggregating the petitioner's entire output.

4. That more than 90% of the business of the petitioner consisted in furnishing all the necessary bunker coals required by the buyers for definite periods of time, for the use of all the steamers under their registered managing ownership and coaling at certain specified ports.

5. That during the period June to November, 1918 the total amount of coal called for under the contracts then in existence be-

tween the petitioner and buyers was 160,354.65 tons, the monthly requirements being as follows:

June	25087.20
July	34251.10
Aug.	24755.61
Sept.	27926.74
Oct.	24117.52
Nov.	24216.48
	160354.65

3 6. That during the period June to November, 1918, the quantity of coal mined and shipped by the petitioner totalled 112756 tons, and the monthly production was as stated below:

June	19500
July	21142
Aug.	19346
Sept.	18015
Oct.	21586
Nov.	13167
	112756

7. That by reason of inadequate and insufficient labor and lack of sufficient car supply and other conditions beyond the petitioner's control, a shortage in production below the contract obligations, amounting to 47,598.65 tons had resulted during the period June to November, 1918.

8. That notwithstanding the fact that the petitioner's entire output of coal during the said period had been contracted for, and that for the reasons set out above, an actual shortage in production prevented the meeting of contract obligations, the Federal Fuel Administration requisitioned and compelled petitioner to divert 12,823.89 tons of coal during the aforesaid period as follows:

June	1141.53
July	1471.95
Aug.	3491.27
Sept.	403.34
Oct.	3943.39
Nov.	2372.41
	12823.89

4 9. That the price received by the petitioner on coal requisitioned or diverted by order of the Fuel Administration was $3.304 per gross ton, whereas the price stated in the contracts under which this coal had been previously sold was $4.50 per gross ton.

10. That upon each ton of coal requisitioned or diverted by the Fuel Administration, the petitioner suffered a loss of $1.196 and upon the 12,823.89 tons, the total quantity requisitioned or diverted, the loss amounted to $15,337.37.

11. That no action upon your petitioner's foregoing claim has been had before Congress or either House thereof. That claimant is the sole owner thereof and the only party interested therein and that no assignment or transfer of the said claim or any part thereof or any interest therein had been made; that the claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets and that the claimant has at all times borne true allegiance to the Government of the United States and has not in any way aided or abetted or given encouragement to rebellion against the said Government.

Wherefore your claimant prays:

1. That the Court will render a judgment against the United States in full for the payment by the United States to your petitioner of the said sum of $15,337.37.

2. That your petitioner may have such other and further relief as justice and the exigencies of its case may require.

THE MORRISDALE COAL COMPANY,
By F. H. WIGTON,
President.

BAKER & BAKER,
Attorneys of Record.

5 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Before me, a Notary Public in and for the State and County aforesaid personally came F. H. Wigton, who being duly sworn saith that he is President of the Morrisdale Coal Company, petitioner in the foregoing petition and that the statements therein are just and true to the best of his information and belief.

Sworn and subscribed to before me this 19th day of December, 1919.

[SEAL.] EDWARD J. FISHER,
Notary Public.

Commission expires February 23, 1921.

6 II. *Defendant's Demurrer.*

Filed March 27, 1920, by Leave of Court.

Now comes the defendant, by the Attorney General, and demurs to the petition filed herein, and for grounds of demurrer, says:

I. That the facts alleged in said petition do not constitute a cause of action within the jurisdiction of this court.

II. That said petition does not allege facts sufficient to constitute a cause of action.

FRANK DAVIS, JR.,
Assistant Attorney General.

WILFRED HEARN,
Special Assistant
to the Attorney General.

III. *Argument and Submission of Demurrer.*

On April 12, 1920, the demurrer in this case was argued by Mr. Wilfred Hearn, for the demurrer, and by Mr. John A. Selby, in opposition thereto, and submitted.

7 IV. *Opinion of the Court by Hay, J., on Demurrer.*

Entered April 26, 1920.

HAY, *Judge,* delivered the opinion of the court:

This is a petition brought by the Morrisdale Coal Company, a corporation of the State of Pennsylvania, to recover from the United States the sum of $15,337.37. To this petition of the plaintiff the defendants have demurred.

The plaintiff alleges in its petition that it was during the times mentioned therein engaged in the business of mining and shipping Morrisdale and Cunard bituminous coals, having its principal place of business in the city of Philadelphia; that the President of the United States, by virtue of the act of Congress approved August 10, 1917, did, on August 23, 1917, by Executive order, appoint Harry A. Garfield Fuel Administrator and delegate to him such powers and authority as had been invested in the President by the act aforesaid in so far as the same were applicable to fuel; that prior to August 23, 1917, the plaintiff had entered into bona fide contracts for the supply of coal to buyers, the requirements of such contracts aggregating the plaintiff's entire output; that more than ninety per cent of the business of the plaintiff consisted in furnishing all the necessary bunker coals required by the buyers for definite periods of time for the use of all steamers at certain specified ports; that during the period June to November, 1918, the total amount of coal called for under the contracts then in existence between the plaintiff and the buyers was 160,354.65 tons, with certain monthly requirements. It is further alleged that during the period June to November, 1918, the quantity of coal mined and shipped by the plaintiff totaled 112,756 tons, which was 47,598.65 tons less than the quantity contracted for the period of June to November, 1918; that during the period aforesaid the Federal Fuel Administration requisitioned and compelled plaintiff to divert 12,823.89 tons of coal. It is further alleged in said petition that the price received by the plaintiff for the coal so requisitioned or diverted was $3.304 per gross ton, whereas the price stated in the contracts under which this

coal had been previously sold was $4.50 per gross ton. The petition further alleges that upon each ton of coal requisitioned or diverted by the Fuel Administration the plaintiff suffered the loss of $1.196, and upon the whole quantity requisitioned or diverted its loss amounted to $15,337.37, for which amount he sues.

The plaintiff in bringing its action relies for relief upon the provisions of the act of August 10, 1917, and in its brief filed in this cause relies further upon the provisions of the fifth amendment to the Constitution.

8 The sections of the act of August 10, 1917, which deal with the requisitioning and diversion of fuel are sections 10 and 25, 40 Stat. 279, 284.

Section 10 provides "That the President is authorized, from time to time, to requisition foods, feeds, fuel, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and he shall ascertain and pay a just compensation therefor. * * * If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sums as, added to said seventy-five per centum, will make up such amount as will be just compensation * * *."

In pursuance of the provisions of the act of August 10, 1917, the President, on March 15, 1918, issued a proclamation, appointing Harry A. Garfield Fuel Administrator, and delegated to him the powers which were conferred upon the President by the act aforesaid (40 Stat. 1757).

The petition in this case does not allege that the coal was requisitioned by the President or by the Fuel Administration for public use, nor that the compensation which it received was ascertained by the President or the Fuel Administration, nor that the compensation was unjust, nor that the plaintiff was not satisfied with the compensation it received, nor does the petition allege from whom the compensation was received. We therefore conclude that the petition does not show a cause of action under section 10 of the act.

Section 25 of the act of August 10, 1917, deals entirely with the subject matter of fuel, and provides "That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, whenever and wherever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign." It is further provided that if any producer or dealer fails or neglects to conform to such prices and regulations the President is authorized to take over the plant or business of such producer or dealer and to operate the same, and provision is made for the conduct of the business so taken over by the President. (40 Stat. 284, 285.) There is nowhere in this section or in the statute any provision made for suits by individuals

or corporations against the United States in cases where the President or the Fuel Administration in the exercise of the powers conferred by the statute diverts coal among dealers and consumers, and thereby incidentally causes the dealer to receive less for his product than he might have received had he been allowed to distribute his product in accordance with his own plans and methods.

The plaintiff, however, seems to rely upon the following provision of the statute: "The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the commission." (40 Stat. 286.)

9 The plaintiff construes this provision to mean that whenever the President or the Fuel Administration, in the exercise of the powers conferred upon them by the statute, diverts coal from one consumer to another, and the dealer has a contract made in good faith with the consumer from whom the coal is diverted at a price higher than that received by him from the consumer to whom the coal is diverted, then the United States must pay the difference in price to the dealer. We do not think that is the meaning of the provisions of the act. What is meant is that as between the parties to a contract made in good faith prior to the establishment and publication of a maximum price, neither party can substitute the price fixed and published by the Government in place of the price fixed by the contract.

We conclude, therefore, that there is nothing in section 25 of the act which, under the allegations of the petition, gives to the plaintiff a right of recovery.

This brings us to consider whether or not the plaintiff has a right of action under the fifth amendment to the Constitution. Have the defendants by diverting the coal of the plaintiff from the consumers with whom it had a contract to consumers with whom it had no contract, thereby causing the plaintiff to lose a part of its contract price, taken the property of the plaintiff for public use without just compensation?

The act of August 10, 1917, reads as follows: "That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, fuel including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds and fuel, hereafter in this Act called necessaries; to prevent, locally, or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential

effectively to carry out the provisions of this act." (40 Stat. 276.) The Constitution confers upon Congress the power to declare war, and confers upon it power to make all laws necessary and proper to carry into effect the granted powers, which must of necessity include the power to adopt and provide for all necessary means to enable the Government to conduct the war to a successful issue. This power is essential, not only for the purpose of defeating the enemy by supporting and maintaining the Army and Navy, but also to provide for the general welfare, and to insure the prosperity of the country and of the people during the progress of the war.

The statute under discussion, among other things, provides that the President shall have power to distribute coal among dealers and consumers, and in order to exercise that power it became necessary for him to adopt regulations as to the means of distribution, and to impose upon dealers the duty of distributing coal to consumers in such a manner as to provide for and preserve the industries of the country, as well as to provide for the health and welfare of the people at large by furnishing them with fuel. If in carrying out these powers some dealer was deprived of a price for his coal which he had contracted for, does that impose upon the Government an obligation to pay the difference in the price contracted for and the price obtained from the person to whom the President directed him to deliver the coal? Is such an act done by the President in the exercise of the war powers conferred upon him by Congress a taking of property within the meaning of the fifth amendment of the Constitution? The power of the Government in time of war to impose conditions and restrictions upon industries and to regulate the conduct of its citizens is undoubted. It is a power which belongs to the Government as incident to the power to declare war and to carry it on to a successful termination. The regulations made by the President under the authority of the statute are simply the exercise of that war power, and if the statute is an exercise of the war powers of the Government it is not affected by the restrictions imposed by the fifth amendment of the Constitution. Miller v. United States, 11 Wallace, 268; Hamilton v. Dillin, 21 Wallace, 73. That the statute was a legitimate exercise of the war power can not be successfully questioned. Not only under the war power, but under the power of Government inherent in every sovereignty, "the Government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good." Munn v. Illinois, 94 U. S., 125. "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. Where, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use he must submit to the control." Munn v. Illinois, supra, p. 126.

Certainly the business of mining and shipping coal is one in which

the public has an interest at all times. But in time of war it becomes a business which is vital not only to the interest of the general public, but to the very existence of the Government itself and to the agencies which the Government must use for the successful termination of the war in which it is engaged. Moreover, the statute under discussion gave to the dealer in coal who was not satisfied with the regulations prescribed by the President the privilege of giving up his business, in which event the Government would have taken it over, and would have paid him for it, and if he was not satisfied with the valuation placed upon it by the Government he was given the further privilege of suing the United States for its value in the courts.

It has been repeatedly held by the Supreme Court of the United States that when governmental powers are legitimately exercised for the public good, and the injury complained of is only incidental to their exercise, there is no taking of property for the public
11 use. C., B. & Q. Railway v. Drainage Commissioners, 200 U. S., 593, where it is said by the court: "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution."

"The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the State by reasonable regulations to protect the lives and secure the safety of the people." Chicago, Burlington & Quincy Railroad Company v. Chicago, 166 U. S., 226, 252. See also New York & New England Railroad Company v. Bristol, 151 U. S., 556, 567.

In exercising the war powers conferred upon it by the Constitution, Congress has legitimately exercised them in the act of August 10, 1917, and having legitimately exercised them, the injury to the plaintiff, if injury there be, is only incidental to their exercise, and there has been no taking of its property for public use, and it is not entitled to compensation.

For the reasons given, the demurrer of the defendants to the petition of the plaintiff is sustained. The petition will be dismissed with leave to the plaintiff to amend the same within thirty days if it so desires.

Graham, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

12 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the twenty-sixth day of April, A. D., 1920, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the claimant's petition, on consideration whereof the court is of the opinion that the demurrer is well taken.

It is therefore ordered, adjudged and decreed that the defendant's said demurrer to the claimant's petition be sustained, and that the petition be and the same is hereby dismissed.

BY THE COURT.

VI. *Claimant's Application for and Allowance of an Appeal.*

From the judgment rendered in the above-entitled case on the twenty-sixth day of April nineteen hundred and twenty the plaintiff by its attorney on the 19th day of May nineteen hundred and twenty makes application for and gives notice of an appeal to the Supreme Court of the United States.

BAKER & BAKER,
Attorneys for the Plaintiff.

Filed May 19, 1920.

Ordered:

That the above appeal be allowed as prayed for.

BY THE COURT.

May 19, 1920.

13 Court of Claims.

No. 34436.

THE MORRISDALE COAL COMPANY

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case on demurrer; of the opinion of the court by Hay, J., on demurrer; of the judgment of the court; of the claimant's application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set may hand and affixed the seal of said court at Washington City this 19″ day of May, A. D., 1920.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 27,708. Court of Claims. Term No. 358. The Morrisdale Coal Company, appellant, vs. The United States. Filed May 22d, 1920. File No. 27,708.

APPELLANTS' BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920, No. ~~358.~~ 65

THE MORRISDALE COAL COMPANY, *Appellant,*

vs.

THE UNITED STATES.

BRIEF OF APPELLANT.

GIBBS L. BAKER,
KARL KNOX GARTNER,
Counsel for Appellant.

Press of Byron S. Adams, Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920, No. 358.

THE MORRISDALE COAL COMPANY, *Appellant*,

vs.

THE UNITED STATES.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This case is before this court upon appeal from a judgment of the Court of Claims sustaining a demurrer to the petition. The petition (Printed Record, p. 1) alleges that Congress enacted a certain act approved August 10, 1917, entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," referred to hereinafter as the Lever Act (40 Stat., 276), and that pursuant to the authority vested in him by that Act, the President on August 23, 1917, appointed a Fuel Administrator to whom was delegated the authority vested in the President by that Act. That the Fuel

Administrator requisitioned and compelled the petitioner to divert 12,823.89 gross tons of bituminous coal from buyers of said coal with whom petitioner had contracts entered into prior to the passage of said Act; that the price received for the coal diverted as fixed by the Fuel Administrator was $3.304 per gross ton, whereas the contract price under which the coal diverted had been sold, was $4.50 per gross ton, to petitioner's loss per gross ton of $1.196 or a total loss of $15,337.37.

The appellant did not contend before the Court of Claims and does not here pretend that its case is in any sense laid under the provisions of the Lever Act. Such reference as was made to the Lever Act in the presentation of the case to the Court of Claims was in support of the jurisdiction of that Court to entertain this suit and so here we would point out that the Court of Claims was in error when it said in its opinion:

> "The plaintiff in bringing this action relies for relief upon the provisions of the Act of August 10, 1917." (Printed record, p. 5.)

The allegations of the petition manifestly do not make out a case under the provisions of the Lever Act and such was not the purpose.

Nor does the appellant question in this case the constitutionality of the Lever Act as a war measure, as the Court of Claims seems to view it. (See opinion, pages 6, 7 and 8, printed record.)

The appellant grants that when as a part of the war making power it becomes necessary to the ends of war making to confiscate property, and particularly coal, that such right and power is in the Government and

admits that the Lever Act is for present purposes, an exercise of such governmental power.

The contentions of appellant are: (1) that, while the Government may confiscate or commandeer private property in the exercise of its war power, yet in the exercise of such war power the Government may not override the guarantees to its citizens under the Constitution; (2) that where certain property is necessary to the making of war, the Government unquestionaably may take the property and use it as it sees fit, but the fact that property is taken in the exercise of its war power does not relieve the Government from its obligation under the Constitution to reimburse the citizen for the just value thereof.

The specific property may not be withheld from the Government in the face of a war making necessity, but such necessity does not repudiate the obligation to make just compensation. Under Article 5 of the Federal Constitution property may not be taken for the public use without just compensation.

The Court of Claims holds:

> "In exercising the war powers conferred upon it by the Constitution, Congress has legitimately exercised them in the Act of August 10, 1917, and having legitimately exercised them, the injury to the plaintiff, if injury there be, is only incidental to their exercise and there has been no taking of its property for public use, and it is not entitled to compensation." (Opinion, printed record, p. 8.)

The questions presented upon this appeal accordingly, are (1) Has there been a taking of property for public use; (2) If so, has just compensation been made for the property so taken.

ARGUMENT.

The Lever Act, in Section 2, authorizes the President "to create and use any agency or agencies" in order to carry out the purposes of the Act. This Act also provides at Section 25 as follows:

> "That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal or coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic and foreign."

As this Court well knows the President pursuant to the powers so delegated by the Lever Act, by Executive Order dated August 23, 1917, appointed a Fuel Administrator who proceeded among other things to execute the powers conferred by Section 25 as quoted. The Fuel Administrator in the exercise of the powers conferred by Section 25 as quoted, fixed the price to consumers of coal of the quality here involved at $3.304 per gross ton f.o.b. the mine, and issued orders from time to time pursuant to his power to regulate the distribution of coal, diverting coal to industries and enterprises which in his judgment would best promote the prosecution of the war and meet the existing emergency.

It was pursuant to these powers conferred by Section 25 that appellant's coal was diverted from buyers with whom appellant had contracted to furnish the particular coal at a price of $4.50 per gross ton, to others

designated in the orders of the Fuel Administrator. From these others the appellant received only $3.304, per gross ton, the price fixed by the Fuel Administrator as the maximum that could be charged.

In addition to the powers named, the Lever Act also provided for the Government's commandeering coal that might be needed for use in some arsenal, camp, public building or the like, or for the Government's taking over the entire plant or mine of any operator when such action was deemed necessary in order more efficiently to meet the war emergency. These powers were provided for under Sections 10, 12 and 25.

In connection with these powers last mentioned, it was also provided that the United States should make just compensation for the taking over and occupation by the Government of any factory, mine or plant as well as for fuel so commandeered by the Government and that such compensation should be fixed by the President. It was also provided that if the compensation so determined be not satisfactory to the person entitled to receive same, such person should be paid seventy-five per centum of the amount so determined by the President and should be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum would make up such amount as would be just compensation for such fuel, mine, or plant commandeered.

It will be noted that the provisions for the payment of seventy-five per centum of the just price so fixed by the President or the Fuel Administrator applies only in connection with coal bought by the United States or in connection with the compensation paid for the use of a mine or plant taken over and operated by the United States. The right as authorized by the

Lever Act, to sue the United States for the balance of such price as is deemed reasonable, consequently applies only to the cases specified—namely, where the United States purchases the coal or takes over the actual operation of the particular mine or plant for its own use.

Attention is specifically directed to the fact that the Lever Act makes no provision for a suit or the filing of a claim against the United States in connection with the price which the President was authorized to fix on coal to be sold by dealers and operators among themselves or to consumers.

The appellant's coal was not purchased by the United States and these provisions of the Lever Act for testing the justness of the compensation fixed pursuant to the Lever Act are not open to the appellant. The appellant's coal was diverted from buyers to whom it had been sold upon *bona fide* contracts stating a price of $4.50 per gross ton, to others designated in orders of the Fuel Administrator and under the provisions of Section 25 of the Lever Act the appellant could not charge or receive from the parties to whom its coal had been diverted, a price greater than the price fixed by the Fuel Administrator which was $1.196 per gross ton less than the price it would have received if appellant had been permitted to forward said coal to the contract buyers.

Manifestly, the appellant's case can not be brought under the provisions of the Lever Act directing the procedure for securing a review of the price fixed on coal purchased by the United States. It is equally clear that if the appellant has a remedy open to it at all that remedy lies in the Court of Claims under the general jurisdiction of that Court as specified in Sec-

tion 145 of the Judicial Code where the jurisdiction of that Court is defined as follows:

> "Section 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> "1st. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulations of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims, the party would be entitled to redress against the United States either in a Court of Law, Equity, or Admiralty, if the United States were sueable."

The appellant's coal was diverted under orders of the Fuel Administration. The Fuel Administrator in issuing these orders was acting pursuant to a law of Congress. The result of the orders of the Fuel Administrator is claimed to have been a taking of private property for public use for which just compensation has not been paid in violation of Article 5 of the Federal Constitution.

Plainly, this case comes within the general jurisdiction of the Court of Claims and the claim here presented cannot be brought under the provisions of the Lever Act.

The sole issue presented is simply this—the Fuel Administrator diverted 12,823.89 gross tons of appellant's coal from buyers with whom appellant had *bona fide* contracts under which it would have received $4.50 per gross ton, to others from whom appellant

received only $3.304 per gross ton—the price fixed by the Fuel Administrator pursuant to the Lever Act. These contracts covered the entire output of appellant's mine so that there was no coal available with which to fill these contracts, in addition to the coal diverted.

1. Was this a taking of appellant's property for public use?

2. If there was a taking for the public use, was the price of $3.304 per gross ton fixed by the Fuel Administrator, and the price received for the coal diverted, just compensation for this coal in the face of the fact that there were *bona fide* contracts in existence under which the petitioner would have received $4.50 per gross ton but for the Governmental interference?

I.

Was this a taking of appellant's property for public use?

The Fuel Administration was a public agency. It functioned by virtue of the powers delegated by the Lever Act, an Act of Congress. The constitutionality of the Lever Act insofar as it provided for the fixing of the price of coal to consumers depends entirely upon the war power of the Government pursuant to which the Government may during a war emergency take over by purchase all the coal in the country and engage in the coal business itself and sell coal to consumers at prices determined by the Government. The price-fixing power to be constitutional must rest upon the right of the Government itself to commandeer the property for a public use. The Government cannot take any property except for the public use.

In times of peace, property may be taken under the right of eminent domain and in times of war property may be commandeered or requisitioned, just as soldiers may be conscripted, but property may only be taken, in times of peace or in times of war, for the public use.

If the power to fix the price must rest upon the right to take the property itself and if the power to take the property itself depends upon its being a taking for the public use, then if the Lever Act insofar as the price-fixing provisions are concerned, is to be construed to be constitutional, it must be presumed that the action of the Government was a taking of property for the public use.

Either the price-fixing provisions of the Lever Act, here involved, are in effect a taking of property for the public use, or they are unconstitutional. Or stated conversely, if these provisions of the Lever Act are constitutional then the price-fixing prerogative exercised by the Government thru the agency of the Fuel Administration was a taking of property for the public use.

Of course it is a fundamental rule of statutory construction that where an Act is susceptible of more than one interpretation that construction will control which will render the Act constitutional.

The Lever Act was enacted as an exercise of the war power of the Government. The exercise of the war power presumes the existence of a public necessity. If these provisions of the Lever Act are constitutional, then it must follow that the Governmental agencies provided for thereunder must be presumed to have functioned in the public interest. If the Fuel Administration in issuing its orders requisitioning and divert-

ing appellant's coal was acting in the public interest, certainly its functioning was for the public use. There can be no question as to the taking. The demurrer to the petition alleging that the coal was requisitioned and diverted, admits the taking, for the purposes of this argument. It can but follow, therefore, that the requisitioning and diverting by the Fuel Administration was a taking of private property for the public use.

The Fuel Administration's functioning was an exercise of the war power conferred upon Congress by the Constitution. The creating of the Fuel Administration and its acts, in requisitioning and diverting coal, were undoubtedly legitimate exercises of the war power, but the fact that the appellant's coal was taken incidental to the exercise of the war power does not repudiate the obligation under the Constitution to make just compensation therefor.

In *Monongahela Navigation Company vs. U. S.*, 148 U. S., 312, Mr. Justice Brewer, speaking for this Court, at page 336, said:

> "Like all the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument."

The power to make war must be included in the statement of the Court:

> "Like all the other powers granted to Congress by the Constitution,"

and the war power is likewise subject to

> "all the limitations imposed by such instrument."

The exercise of the war power, therefore, must be subject to the limitations of Article 5 of the Constitution, that

> "private property must not be taken for public use without just compensation."

This is so fundamental and the Court of Claims is so manifestly in error on the constitutional question presented that we pass on without trying the patience of this Court with the recital of further authorities.

II.

If there was a taking for public use, was the price of $3.304 per gross ton fixed by the Fuel Administration, the price received for the coal requisitioned and diverted, just compensation for this contract coal?

The contracts for the coal diverted were made prior to August 10, 1917, and were *bona fide* contracts. Under them the appellant would have received $4.50 per gross ton for every gross ton that was diverted by this Governmental agency. The contract price under such circumstances is the conclusive measure of just compensation.

In the *Monongahela case, supra,* Mr. Justice Brewer on the matter of just compensation, at page 343, said:

> "the question of just compensation is not determined by the value to the Government which takes, but the value to the individual from whom the property is taken."

We submit that the contract price of $4.50 per gross ton is the value to appellant and that appellant has not

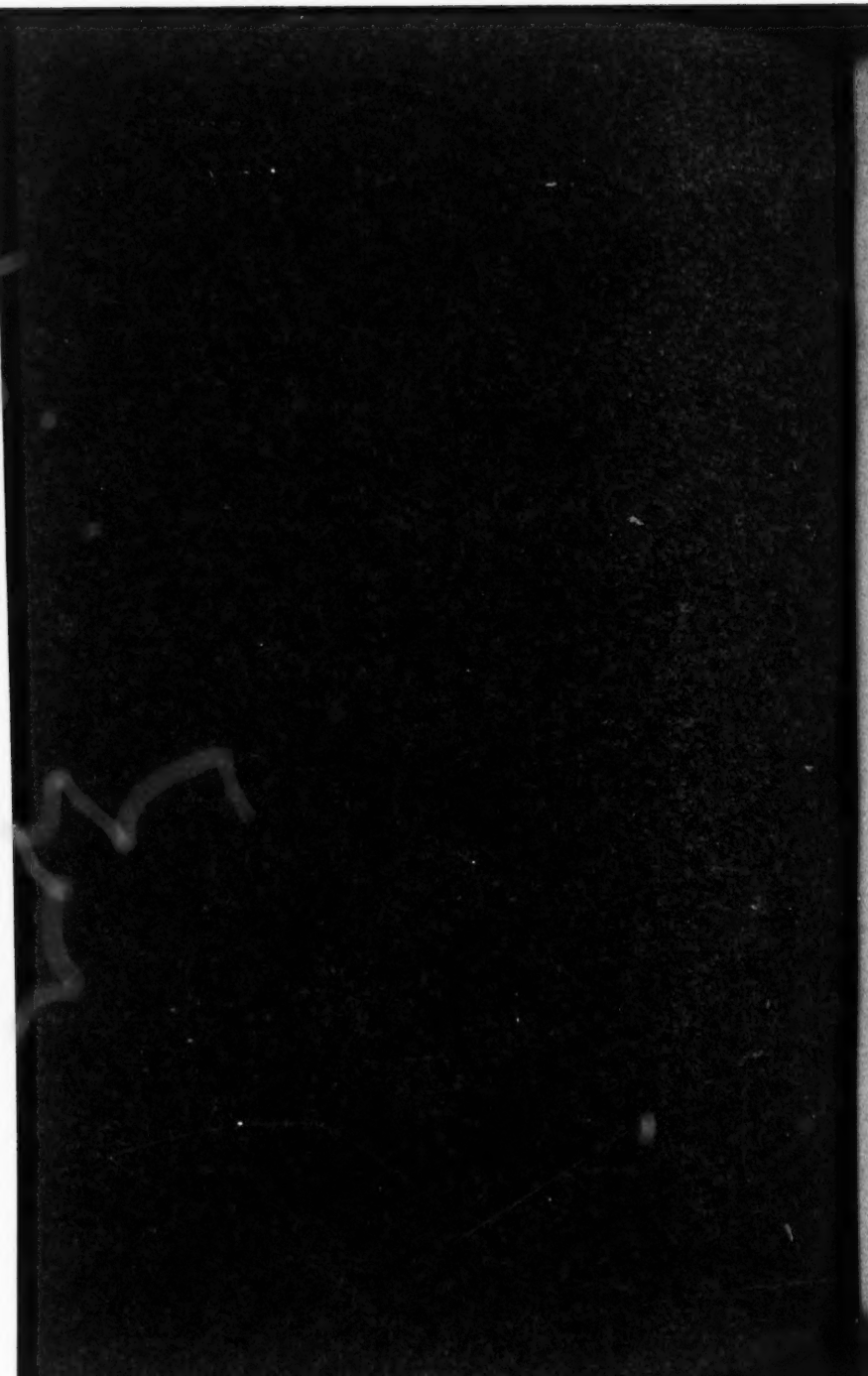
been justly compensated to the extent of $1.196 per gross ton, the difference between the contract price and the $3.304 price fixed by the Government and received for the coal diverted, or a total on the 12,823.89 gross tons of $15,337.37.

CONCLUSION.

The appellant respectfully submits that the demurrer should be overruled.

Respectfully submitted,

GIBBS L. BAKER,
KARL KNOX GARTNER,
Counsel for Appellant.



In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE MORRISDALE COAL COMPANY, *Appellant*,
v.
THE UNITED STATES.
No. 65.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on appeal from a judgment of the Court of Claims sustaining a demurrer which challenged the jurisdiction of that court and questioned the sufficiency of the facts averred in claimant's petition to constitute a cause of action. The petition alleged that claimant (prior to advent of federal control) had contracted for the sale of the total output of its coal mines; that, thereafter, during June to November, 1918, twelve thousand and odd tons were "requisitioned" and diverted elsewhere, the price received being less than the sale price agreed to by its former customer; that the coal was thus diverted by order of the Fuel Administration

under powers conferred by the Act of August 10, 1917, ch. 53 (40 Stat. 276).*

Scope of the issues raised by the pleadings.

Appellant does not here insist that its output was actually expropriated or used for any governmental purpose. The petition does not aver with requisite legal certainty that claimant's property was requisitioned for public uses. Nevertheless, in the brief some reliance is placed on the allegation that the Fuel Administration "requisitioned" and compelled petitioner to divert certain tonnage. It is urged that since the demurrer admits the allegation that the coal was "requisitioned," etc., a taking is admitted. But the allegation that the property was "requisitioned" (if by this is meant that property was expropriated by eminent domain for federal uses) is a mere legal conclusion from the facts stated which is not admitted but expressly challenged by the demurrer.

The claimant did not below and does not here contend that its case is in any wise laid under any

* Sec. 25 of this Act (known as the Lever Act) reads in part: That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign; said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary. (40 Stat. 284.)

By Executive Order of the President dated August 23, 1917, a fuel administrator was appointed.

The United States Fuel Administration was created by Proclamation o March 15, 1918, 40 Stat. 1757.

of the remedial provisions of the Lever Act. It is, consequently, not necessary to argue the obvious proposition that the language of this statute does not impose upon or admit the liability of the United States to make good the differences between prices fixed during federal control and prices which might otherwise have been obtained either in open market or under sales contracts made prior to the order of the Fuel Administration.

In substance, therefore, the asserted expropriation of property consists simply in claimant's obedience to an order compelling it to divert a portion of its output, thereby preventing compliance with sales contracts previously entered into with other parties at a better price, and the sole question presented is whether, in time of war, exercise to this extent of federal power in regulating price and controlling distribution of coal amounts in law to a taking of private property for public use, entitling claimant to recover in the Court of Claims compensation under the fifth amendment.

ARGUMENT.

The applicable portions of the Lever Act regulating the coal industry are a valid exercise of the war powers of Congress.

Claimant does not contest the constitutionality of this legislation. Under the war powers expressly delegated coupled with the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers * * *" the fed-

eral government, when exercising this constitutional function, possesses full sovereignty subject only to the limitations written in the Constitution.

Hamilton v. *Kentucky Distilleries*, 251 U. S. 146;

Jacob Ruppert v. *Caffey*, 251 U. S. 264, 301.

The scope of the war power is quite as wide as that of the power to regulate interstate commerce.

Cf. *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 480;

Atlantic Coast Line v. *Riverside Mills*, 219 U. S. 186, 201.

That for the war period* and for the war purposes set forth in section 1, Congress might constitutionally fix the price and regulate distribution of coal, can not be doubted.

In *Hamilton* v. *Kentucky Distilleries, supra*, this court sustained power to forbid altogether sale of a lawful commodity, saying: "When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose."

No constitutional objection to federal price regulation, etc., in war time exists because of the fact that similar regulation by states is ordinarily classed or defined as exercise of "police power."

* The life of the act was so limited, sec. 24, p. 283.

Federal regulation of the sale and distribution of coal is constitutionally justified whenever it fairly appears to the legislative mind that this business is clothed with a public interest reasonably calling for federal control to meet the exigencies of war.

This court in *Block* v. *Hirsh* (decided April 18, 1921), sustaining emergency regulation of rent, said:

> Circumstances may so change in time or so differ in space as to clothe with a public interest what at other times or in other places would be a matter of purely private concern * * *.
>
> If the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn* v. *Illinois*, 94 U. S. 113. 41 Sup. Ct. Rep. 458.

Block v. *Hirsh* involved exercise of police power in the District of Columbia. It stands, however, on ground no more solid than federal regulation of coal (the one indispensable material of modern war) under the war power.*

Public regulation otherwise valid is not objectionable because thereby a contract valid in its inception becomes impossible of performance.

If an industry be of the class declared affected by a public interest and hence subject to legislative control in its methods of business and in its charges,

* The constitutionality of sec. 25 of the Lever Act has been sustained.
United States v. *Ford*, 265 Fed. 424;
United States v. *Central Coal Co.*, 256 Fed. 703;
Cf. *American Coal Mining Co.* v. *Special Coal, etc., Commission of Indiana*, 268 Fed. 563.

the power to regulate must necessarily be unaffected and undiminished by the existence of contracts entered into prior to the advent of public control.

Union Dry Goods Co. v. *Georgia, etc.*, 248 U. S. 372, 375.

Producers Transportation Co. v. *R. R. Commission, etc.*, 251 U. S. 228, 232.

Every such contract is entered into subject to the possibility that the sovereign may render it unenforceable or impair its value.

L. & N. R. R. v. *Mottley*, 219 U. S. 467, 480–486;

Knoxville Water Co. v. *Knoxville*, 189 U. S. 434, 438.

To assert that its existing contracts excluded this claimant's industry from the field of "uncompensated" legislative control of its charges and deliveries is to deny the possibility of *any effective regulation.*

The principle stated is not affected by the circumstance that federal regulation of the coal industry under the war powers is a legislative novelty.

In *Vandalia Coal Company* v. *Special Food & Coal Commission*, 268 Fed. 572, an order of a state commission requiring delivery of coal to specified concerns was temporarily enjoined because it affected the mining company's existing contracts to deliver coal elsewhere. The order was held void because the recognized principle that existing contracts must be deemed to have been made subject to the reserved power to regulate industry (police power) was thought to apply only to such industries as were (at the time

of the passage of the regulating statute) "public utilities," i. e., recognized as affected by a public interest, and did not apply to a purely private enterprise which, for the first time, is declared by the state to be affected with a public interest.

The case deals only with state police power, but it is believed that the principle announced is without support in reason or authority.

It will be sufficient to cite a few controlling decisions of this court.

In the leading case which dealt with a regulation fixing maximum charges for storage of grain, this court said:

> Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.
>
> It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regula-

> tions complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good.
>
> *Munn* v. *Illinois*, 94 U. S. 113, 133.

In answer to the contention that fire insurance was a private business not within the police power to the extent of fixing rates, this court said, in substance, that the test is not whether a *public trust* has been imposed upon the *property* but whether the *business* has become so far affected with a public interest as to justify legislative regulation of rates.

> *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, 407, 411.

The reasoning of this case demonstrates that full exertion of all the incidents attendant upon power to regulate does not in any sense hinge upon the circumstance that the business has been theretofore regarded as a public utility so-called.

Legislation regulating rents in the District of Columbia affected directly a valuable right to enforce the tenant's covenant to surrender possession of real estate on expiration of the term. The legislation was novel but this circumstance could not and did not affect the reserved power to legislate, although thereby a pre-existing contract otherwise valid was rendered unenforceable.

> *Block* v. *Hirsch*, 41 Sup. Ct. Rep. 458;

Marcus Brown Holding Co. v. *Feldman*, 269 Fed. 306;

Same v. *Same*, 41 Sup. Ct. Rep. 465;

People ex rel Realty Corporation v. *La Fetra*, 230 N. Y. 429.

The inactivity of a governmental power, no matter how prolonged, does not militate against its legality when exercised.

German Alliance Insurance Co. v. *Kansas*, 233 U. S. 389, 415–6.

The application of the principle that a valid contract may be rendered unenforceable or worthless by the exercise of federal power cannot turn on the consideration that the power has been hitherto dormant. To assert the contrary is to deny the power.

Regulation affecting preexisting contracts is not an exercise of eminent domain power.

The diversion of coal in question here was not a taking of private property for public use binding the Government to indemnify.

Public regulation restrictive of freedom of contract and of self-controlled business management is universally imposed without provision for compensation. It is the universal rule that regulation constitutionally permissible does not involve exercise of the power of eminent domain.

Contentions that public regulation imposing burdens or diminishing the usefulness or value of property is an expropriation requiring indemnity, have been everywhere denied. The underlying principle

is that unless property is actually taken—unless it is directly put to use by the State for a public purpose—no duty to compensate arises since the injury complained of results incidentally from valid exercise of governmental power. In these circumstances there is no taking.

Legal Tender Cases, 12 Wall., 457, 551;
Transportation Co. v. *Chicago*, 99 U. S. 635, 642;
Gibson v. *United States*, 166 U. S. 269, 271, 275–6;
Scranton v. *Wheeler*, 179 U. S. 141, 164;
Wisconsin, etc. Ry. v. *Jacobson*, 179 U. S. 287, 296, 301;
Railroad v. *Mottley, supra;*
C., B. & Q. Ry. v. *Drainage Com'rs, etc.*, 200 U. S. 561, 582–4, 590–4;
Atlantic Coast Line R. Co. v. *Goldsboro*, 232 U. S. 548, 558;
Hamilton v. *Kentucky Distilleries*, 251 U. S. 146, 156–7.

It is doubtful whether any case can be found which has imposed on the public the losses, real or speculative, claimed to have resulted from loss of the right to conduct business without control of charges and free from other burdens incident to legislative regulation.

That obedience to a regulation admitted to be valid imposes on the federal treasury an obligation, cognizable in the Court of Claims, to reimburse for additional profits expected is a contention unsupported by precedent. The theory urged would have

opened the way to recovery from the government of the losses of every railroad limited by the Interstate Commerce Commission to rates less than those stipulated in existing contracts with shippers. It would compel reimbursement from the Treasury of every landlord deprived of increased rent agreed to be paid him by a prospective lessee on expiration of an existing tenancy extended indefinitely by the District of Columbia Rents Act and by action thereunder by the Rent Commission at rental substantially less than that which, but for the statute, the landlord might have received under his contract with his chosen new tenant.

It suffices to reply that the jurisdiction of the Court of Claims to enter judgment on a claim founded on expropriation of property must rest on the receipt of a consideration moving to the United States. Where nothing is actually taken and used there is no basis for an implied promise to make compensation.

Bothwell v. *United States*, 254 U. S. 231.

The price fixed for claimant's coal was not confiscatory.

There is no allegation in the pleadings that the price fixed by the Fuel Administration and received by claimant for the diverted coal did not afford a fair return and reasonable profit on invested capital over and above cost of production and plant depreciation.

The principles announced in the *Minnesota Rate Cases*, 230 U. S. 352, governing controversies as to

the confiscatory character of rate regulation have consequently no application here.

It is submitted that the judgment should be affirmed.

JAMES M. BECK,
Solicitor General.
WILLIAM D. RITER,
Assistant Attorney General.
CHARLES S. LAWRENCE,
Attorney.

OCTOBER, 1921.

○

SUPREME COURT OF THE UNITED STATES.

No. 65.—October Term, 1921.

The Morrisdale Coal Company Appellant, *vs.* The United States. } Appeal from the Court of Claims.

[May 29, 1922.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims dismissing the appellant's petition upon demurrer. The petition alleges that the claimant had outstanding contracts calling for more than the actual production of its mines for the months of June and following through November, 1918, at a price of $4.50 per gross ton; that the Fuel Administration appointed by the President during the war "requisitioned and compelled petitioner to divert 12823.29 tons of coal" during the period mentioned; that the price received for this coal was $3.304 per gross ton, and that the claimant thereby suffered a loss of $15,337.37, for which loss it asks judgment against the United States.

The petition does not allege or mean that the United States took the coal to its own use. The meaning attributed to it by the claimant is merely that the Fuel Administration fixed the price on coal of this quality at $3.304 per gross ton and issued orders from time to time directing coal to such employments as best would promote the prosecution of the war. The Fuel Administration acted under a delegation from the President of the power conferred upon him by the Act of August 10, 1917, c. 53, § 25; 40 Stat. 276, 284, to fix the price of coal and to regulate distribution of it among dealers and consumers; the price so fixed not to invalidate contracts previously made in good faith in which prices are fixed. 40 Stat. 286. The claimant does not argue that this section provides compensation for obedience to orders made in pursuance of the same; it agrees, and rightly, that its remedy, if any, is under § 145 of the Judicial Code giving the Court of Claims jurisdiction of

claims upon any contract, express or implied, with the Government. It contends that upon the facts stated a contract on the part of the Government must be implied, both from the statute and by virtue of the Fifth Amendment on the ground that its property was taken for public use.

We see no ground for the claim. The claimant in consequence of the regulation mentioned sold some of its coal to other parties at a less price than what otherwise it would have got. That is all. It now seeks to hold the Government answerable for making a rule that it saw fit to obey. Whether the rule was valid or void no such consequence follows. Making the rule was not a taking and no lawmaking power promises by implication to make good losses that may be incurred by obedience to its commands. If the law requires a party to give up property to a third person without adequate compensation the remedy is, if necessary, to refuse to obey it, not to sue the lawmaker. The statute provides remedies against the Government in other cases, but the claimant argues that this case does not fall within them, and it did not follow the steps prescribed for them. The petition does not even allege that the price the claimant got was not a fair one but only that if the Government had not issued the regulation it would have got more under its contract. Considerably more than that is needed before a promise of indemnity from the Government can be implied. See *American Smelting & Refining Co.* v. *United States,* May 15, 1922.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.